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Nicholas J. Topitzes

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FOLEY & LARDNER LLP  
150 EAST GILMAN STREET  
P.O. BOX 1497  
MADISON, WI 53701-1497

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REYNOLDS, STEVEN ALAN

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The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* NICHOLAS J. TOPITZES, MELISSA LYNN ANUNSON, and  
JAYNE MARTINSON

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Appeal 2009-000291  
Application 10/757,069  
Technology Center 3700

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Decided:<sup>1</sup> July 28, 2009

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Before DEMETRA J. MILLS, FRANCISCO C. PRATS, and JEFFREY N.  
FREDMAN, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

## STATEMENT OF CASE

The following claim is representative.

1. A holder suitable for holding name badges, comprising:

(a) a platform formed of a single sheet of thin, flexible, thermoformed plastic material, the platform including a top wall, the top wall having an exterior peripheral edge and the top wall comprising a plurality of integrally formed receptacles disposed below the top wall, each receptacle comprising

(1) a peripheral edge having a width and a length and defining a slot in the top wall;

(2) a first receptacle wall extending down from the top wall along a first edge of the peripheral edge to a first depth below the top wall;

(3) a second receptacle wall extending down from the top wall along a second edge of the peripheral edge to a second depth below the top wall, the second depth less than or equal to the first depth; and

(4) a bottom connecting the first receptacle wall to the second receptacle wall, the width defined by the distance across the slot between the first receptacle wall and the second receptacle wall, the length defined by the distance across the slot in the direction perpendicular to the width;

(b) a cover formed of the single sheet of thin, flexible, thermoformed plastic material, the cover comprising

(1) a ceiling;

(2) a cover support integrally formed with the ceiling and extending downward from the ceiling to form an opening with a cover interior peripheral edge generally matching the exterior peripheral edge of the top wall;

(3) a cover flange integrally formed with the cover support and extending outward from the cover support; and

(4) a reinforcement rib extending from a first edge of the ceiling to a second edge of the ceiling, the second edge opposed to the first edge; and

(c) a hinge, the cover flange integrally formed with the platform along the hinge whereby the cover can be swung from an open position to a closed position about the hinge.

*Cited References*

Czopor, Jr.	US 4,619,364	Oct. 28, 1986
Browning	US 4,621,404	Nov. 11, 1986
Prinsloo et al.	US 4,674,628	Jun. 23, 1987
Proffitt et al.	US 5,012,928	May 7, 1991

*Grounds of Rejection*

1. Claims 1, 11 and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning.
2. Claims 3, 5, 6, 13, 15, 16, 23, 25 and 26 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning and further in view of Proffitt.
3. Claims 7-10, 17-20 and 27-30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning and Proffitt and further of Prinsloo.

*Obviousness*

1. Claims 1, 11 and 21 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning.

## ISSUE

The Examiner argues that

it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the ceiling of Czopor to include a reinforcement rib across opposed first and second edges, as taught by Browning, for providing better structural integrity and additional support against impact forces that may damage the contents of the holder.

(Ans. 3.)

Appellants contend that the Examiner failed to establish a prima facie case of obviousness because there is no motivation to combine the cited references because Browning is non-analogous art and the references provide no reasonable expectation of success. Appellants argue that Browning fails to teach the formation of a reinforcement rib in a cover formed of a single sheet of thin, flexible, thermoplastic formed material.

(App. Br. 10.)

The Issue is: Have Appellants demonstrated error in the Examiner's obviousness rejection?

## FINDINGS OF FACT

### 1. The Examiner finds that:

With respect to claims 1, 11 and 21, Czopor discloses all of the limitations of the claims (as can be seen in the 1st office action dated 5/16/06) except for a reinforcement rib extending from a first edge of the ceiling to a second edge of the ceiling, the second edge opposed to the first edge. However, Browning discloses a ceiling/first molded piece (Browning Fig 1 ref 10) having a reinforcement rib (50) extending from a first edge of the ceiling to a second edge of the ceiling, the second edge opposed to the first edge for the purpose of providing additional

strength and rigidity to the ceiling/first molded section (column 4, lines 41-46).

(Ans. 3.)

2. The Examiner argues that

it would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the ceiling of Czopor to include a reinforcement rib across opposed first and second edges, as taught by Browning, for providing better structural integrity and additional support against impact forces that may damage the contents of the holder.

(*Id.*)

3. Browning discloses that “[i]n order to provide additional strength and rigidity to sections 10 and 12, they are provided, respectively, with sloping, shallow crossed rib braces . . . which extend partially up the sides of each section” (Browning, col. 4, ll. 41-45).

## PRINCIPLES OF LAW

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness.” *In re Rijckaert*, 9 F.3d 1531, 1532 (Fed. Cir. 1993) (citations omitted). Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant. *Id.* In order to determine whether a *prima facie* case of obviousness has been established, we considered the factors set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966); (1) the scope and content of the prior art; (2) the differences between the prior art and the

claims at issue; (3) the level of ordinary skill in the relevant art; and (4) objective evidence of nonobviousness, if present.

“[W]hen the question is whether a patent claiming the combination of elements of prior art is obvious” the relevant inquiry is “whether the improvement is more than the predictable use of prior art elements according to their established functions.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 417 (2007).

“When a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* For the same reason, “if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. ...[A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions.” *Id.*

## ANALYSIS

Appellants contend that the Examiner failed to establish a *prima facie* case of obviousness because there is no motivation to combine the cited references because Browning is non-analogous art and that the cited references present no reasonable expectation of success. Appellants argue that Browning fails to teach the formation of a reinforcement rib in a cover formed of a single sheet of thin, flexible, thermoplastic formed material. (App. Br. 10.)

We are not persuaded by Appellants' argument. We essentially agree with the Examiner's reasoning, fact finding and response to Appellants' arguments as set forth in the Answer and adopt them as our own. We provide the following additional comment.

As to Appellants' non-analogous art argument, "[w]hen a work is available in one field of endeavor, design incentives and other market forces can prompt variations of it, either in the same field or a different one. If a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability." *KSR*, 550 U.S. at 417. For the same reason, "if a technique has been used to improve one device, and a person of ordinary skill in the art would recognize that it would improve similar devices in the same way, using the technique is obvious unless its actual application is beyond his or her skill. ...[A] court must ask whether the improvement is more than the predictable use of prior art elements according to their established functions." *Id.* We find that ribs in the plastic luggage of Browning are provided to provide additional strength and rigidity to sections (covers) 10 and 12. (Col. 2, ll. 30-46.) We find such strength reinforcement in the luggage covers of Browning could have prompted variations in the similar field of container covers, as claimed.

We are not persuaded by Appellants' argument that "[t]here is not a reasonable expectation of success in combining Czopor with Browning" (App. Br. 8). As discussed in *Kubin*, "[r]esponding to concerns about uncertainty in the prior art influencing the purported success of the claimed combination, this court [in *O'Farrell*] stated: '[o]bviousness does not require absolute predictability of success ... all that is required is a reasonable



expectation of success.” *In re Kubin*, 561 F.3d 1351, 1360 (Fed. Cir. 2009) (citing *In re O'Farrell*, 853 F.2d 894, 902 (Fed. Cir. 1988).

The instant facts represent a situation where the prior art provides a detailed enabling methodology, with Czopor detailing a holder consonant with the claims (*see* Non-Final Rej. Mailed May 16, 2006 2-3) and Browning disclosing that “[i]n order to provide additional strength and rigidity to sections 10 and 12, they are provided, respectively, with sloping, shallow crossed rib braces . . . which extend partially up the sides of each section” (Browning, col. 4, ll. 41-45).

Appellants provide no evidence of any unpredictability in forming a lid. *See In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (“[A]ttorney argument [is] not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness”). We find that the teaching of Browning on how to place a rib into a plastic lid provides a reasonable, if not absolute, expectation of success.

### CONCLUSION OF LAW

Appellants have not demonstrated error in the Examiner’s obviousness rejection. The obviousness rejection is affirmed.

#### Other Obviousness Rejections

2. Claims 3, 5, 6, 13, 15, 16, 23, 25 and 26 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning and further in view of Proffitt.

3. Claims 7-10, 17-20 and 27-30 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Czopor in view of Browning and Proffitt and further of Prinsloo.

We note that the Brief does not address either of these rejections. Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(vii) (“Any arguments or authorities not included in the brief or a reply brief ... will be refused consideration by the Board, unless good cause is shown.”).

We affirm these rejections for the reasons given by the Examiner in the Answer.

#### SUMMARY

Each of the obviousness rejection is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

#### AFFIRMED

cdc

FOLEY & LARDNER LLP  
150 EAST GILMAN STREET  
P.O. BOX 1497  
MADISON WI 53701-1497